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A Guide For
Records
Custodians

GOVERNMENT DOCUMENTS
COLLECTION

APR 27 1987

University of Massachusetts
Depository Copy



Published by:
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Secretary of State

Access To Public Records

ACCESS TO PUBLIC RECORDS: A Guide For Records Custodians

Almost 100 years ago, the Legislature recognized the importance of public records and took measures to ensure the proper uses of state, county and municipal records.

Today, it is the responsibility of the records custodian to carry out the public records law. The Supervisor of Public Records and the Division of Public Records are available to the custodian for consultation and recommendations pertaining to disclosure of public documents.

The initial statute, enacted in 1897, limited public records to those documents, required by law, to be made or received by a government agency. It was not until 1973 that new legislation provided that all records be available to the public, unless specifically exempted by law. Then, in 1977, the law was further amended, imposing certain time constraints on records custodians when making records available for examination. This same amendment also provides remedies for records requesters, when access is denied, by referring appeals of such denials to the Supervisor of Public Records.

The Supervisor of Public Records is a valuable resource for the records custodian. The Supervisor is empowered by law to determine whether or not records are public and can order disclosure when making the determination.

The records custodian faces an important legal obligation when interpreting and administering the public records law. To further assist the records custodian, the Division of Public Records - located in the Secretary of State's Office - has published this booklet.

Both the Supervisor of Public Records and the Division of Public Records are responsible for counseling the records custodian to fulfill the legal duties outlined in the Massachusetts General Laws.

Public Records are defined in G.L. Chapter 4, Section 7, Clause 26; the public access to records, including the alternatives available to requesters if access is denied, is covered in G.L. Chapter 66, Section 10.

A custodian or keeper of public records has a legal responsibility, upon request, to make the records under his control accessible to the public. Whenever a custodian denies access to records, he must state the specific statutory exemption upon which he has based the denial of disclosure. Additionally, a records custodian must provide appropriate, detailed reasons for claiming a specific exemption.

All records are considered public unless specifically exempted by law. Therefore, appeals brought to the Supervisor of Public Records are determined on the basis of whether or not the records requested fall within the exemptions listed in the law.

This booklet, specifically designed for records custodians, addresses the following questions:

What Is A Public Record?

What Are The Exemptions From Disclosure?

What Are The Responsibilities Of The Records Custodian When A Citizen Seeks Access To Public Records?

What Fees May Be Charged For Copies Of Public Records?

The examples in this booklet are not intended to be restrictive, but rather, are offered as a general guideline in applying the exemptions.

WHAT IS A PUBLIC RECORD?

"All books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations or other documentary materials or data . . . " made or received by state, county and municipal offices are public records, according to the definition provided in G.L. Chapter 4, Section 7, Clause 26. The only exceptions are those records which specifically fall within one of the exemptions detailed in the law.

When a record contains both exempt and non-exempt information, the non-exempt portions are differentiated from the exempt portions and can then be disclosed. Since the law presumes that all records are public, the custodian has the frequently difficult, but always important responsibility of applying a particular exemption to the requested records.

Records held by the State Legislature or the courts do not fall under the purview of the public records law.

WHAT ARE THE EXEMPTIONS FROM DISCLOSURE?

As noted earlier, the exemptions to the public records law are enumerated in Chapter 4, Section 7, Clause 26. We offer, in the following pages, a discussion of the specific exemptions and some examples of where they apply as a means of helping to clarify these important distinctions.

**(a) *Specifically or by necessary implication
exempted from disclosure by statute***

Certain statutes clearly and specifically exempt a record from disclosure. For example, G.L. Chapter 46, Section 2A prohibits the disclosure of impounded birth records to any persons not legally authorized access. Access is limited to authorized persons only, and therefore exempts these records from disclosure under the public records law. Certain other records are also excluded from disclosure. For example, welfare records, (G.L. Chapter 66, Section 17A), and personal income tax records, (G.L. Chapter 62C, Section 21(a)).

(b) *Related solely to internal personnel rules and practices of the governmental unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding*

This exemption allows the non-disclosure of governmental operating manuals and guidelines relating only to intra-agency matters which, if disclosed, would significantly impede the fulfillment of the agency's responsibilities. An instructional manual on computer security would fall into this disclosure exemption.

- (c) *Personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy*

The key word in this exemption is, of course, "unwarranted". In applying this exemption, the public's right to know is carefully weighed against the individual's privacy. The record may be withheld only if the extent and seriousness of the invasion of privacy outweighs the public interest. Decisions of the Massachusetts courts cited welfare payments, alcoholic consumption, family fights and reputation as examples of the information which the privacy exemption is designed to protect.

- (d) *Inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this sub-paragraph shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.*

This exemption preserves a degree of confidentiality necessary to the free flow of advice, recommendations and opinions between persons involved in the development of policy. By affording protection to individuals, whose input may be critical to the quality of the policy ultimately established, this provision encourages candid and complete opinions. Factual materials upon which policy positions are being or have been based, are *not* exempt.

- (e) *Notebooks and other materials prepared by an employee of the Commonwealth which are personal to him and not maintained as part of the files of the government unit*

In this instance, the exemption protects written materials that are not made by an individual in his capacity as a government employee; and therefore are not considered to be a record of the agency. An example would be written information, data, notes or references to personal matters or activities totally unrelated to the office in which the individual is employed. This exemption helps protect those records of a personal nature that an employee may keep in his desk, file cabinet or other place at his work station.

- (f) *Investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest*

This exemption, designed to protect confidential investigative sources, encourages individual citizens to come forward with information and allows law enforcement officials to be candid in recording their investigative observations.

- (g) *Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this sub-paragraph shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit*

Where this exemption allows the private sector to voluntarily provide information, in confidence, to be used in the development of government policy, it does not exempt from disclosure any information filed in compliance with laws or filed in order to receive a benefit from the government. For example, a company may provide certain confidential information vital to the company's interest merely to assist in the formulation of governmental policies. Submitted in confidence, this information may be withheld from disclosure under the public records law. On the other hand, when a company provides data regarding its operations to a government agency in order to secure a contract to do business with the agency, or if such information is required by statute in order that the company may be licensed, the records are public.

- (h) *Proposals and bids to enter into any contract or agreement until the time of the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person*

This exemption prevents the premature disclosure of bids or proposals for government contracts for goods or services, for a limited period of time.

- (i) *Appraisals of real property acquired or to be acquired until 1) a final agreement is entered into; or 2) any litigation relative to such appraisal has been terminated; or 3) the time within which to commence such litigation has expired*

This exemption provides government agencies with the same right of confidentiality as is afforded private parties in eminent domain proceedings or any real estate transactions involving a governmental unit.

- (j) *The names and addresses of any persons contained in or referred to in, any applications for any license to carry or possess any firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards.*

This exemption is limited to specific data concerning applicants and owners of firearms. It exempts from mandatory public disclosure the names and addresses of individuals found on: applications for firearms licenses; firearms identification cards; and, sales or transfers of the enumerated weapons and their licenses or cards. It does not exempt from public disclosure firearms applications or identity cards in their entirety.

- (k) *That part of the registration or circulation records of every public library which reveals the identity of a borrower.*

This exempts from public disclosure the identity of borrowers contained on a public library's registration or circulation records. It does not operate as an exemption for all of a public library's records.

WHAT ARE THE RESPONSIBILITIES OF A RECORDS CUSTODIAN WHEN A CITIZEN SEEKS ACCESS TO PUBLIC RECORDS?

When a requester, for any undisclosed reason, seeks access to public records, the records custodian has two basic responsibilities under the public records law.

First, the custodian must allow for inspection and provide copies of the requested records without unreasonable delay and within a statutorily-established maximum time period of ten days. The request may be made orally, in writing or by mail. This period provides ample time for records search or other contingencies.

Second, the custodian cites the specific exemption being applied under the law when denying disclosure of requested records. The Supervisor of Public Records will make a determination on an appeal of denial, based on the exemptions. In the determination process, the Supervisor may also contact the custodian directly for further information, or in some instances ask for a copy of the requested records to be submitted for examination.

It is the responsibility of the requester to seek a specific and identifiable record. The records custodian is obligated only to provide a requester with existing records. There is no corresponding obligation that a records custodian respond to requests for information which may mean generating a record that does not exist.

In denying access, the records custodian may do so orally, if the original request was made orally. When the request is submitted in writing, the custodian should issue a letter of denial in writing.

The custodian must also inform the requester, when a denial is issued, of his right to appeal the denial to the Supervisor of Public Records, or directly to the courts.

The records custodian has the option of seeking an opinion from the Supervisor of Public Records before making a decision regarding the denial of access, a prerogative exclusive to the records custodian. A requester can only appeal an actual denial.

WHAT FEES MAY BE CHARGED FOR COPIES OF PUBLIC RECORDS?

The public records law allows the custodian to charge a reasonable fee. A custodian may require a deposit or full payment prior to furnishing copies of public records. A good-faith estimate must be provided to a requester where the applicable fees are likely to exceed ten dollars.

FOR MORE INFORMATION:

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